APPEAL NO. 93245

On December 9, 1992, a contested case hearing was held in (city), Texas, Stuart Robertson presiding, to determine whether appellant (claimant) had reached maximum medical improvement (MMI), what her whole body impairment rating was, whether she timely disputed her rating, and whether she currently has disability. The hearing officer concluded that claimant reached MMI on February 21, 1992, with a whole body impairment rating of 5%, that she did not dispute such MMI date and rating within 90 days, and that she does not have disability as such is defined by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act). In her request for review, claimant agrees she did not timely dispute her MMI date and impairment rating but asserts she was unaware she could do so until the 90 day period had long since expired. She disagrees with the adverse determination of disability because she has a bulging disc and still hurts. Claimant seeks another impairment rating from her current treating doctor. The respondent (carrier) contends the evidence is sufficient to support the decision and urges affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant, the sole witness, testified that she began working for carrier as a counselor's assistant in October 1990 where, in performing her various duties with residents, she spent approximately 50% of her time on her feet and the remaining time seated. On (date of injury), she arose from a dining room table at her place of employment, walked a few steps, slid on a chair leg anti-skid device and fell, injuring her left hip, knee and leg. She was taken to a hospital emergency room where a CT brain scan and x-rays of her skull, left elbow and knee, and pelvis were normal. She initially commenced treatment with Dr. L who prescribed a pain medication and obtained a bone scan which was normal. She later began treatment with (Dr. G). Her employment was terminated effective April 12, 1991, due to her absence from work, although her employer offered to accept her application for any position for which she was qualified when she felt she was physically able to return to work. Claimant said that before her fall at work she had planned to attend a cosmetology course and obtain a license so she could pursue additional employment as a hair stylist. Sometime in April or May 1991, she started the course, attended classes from 8:30 a.m. to 5:00 p.m., and was required to stand and bend while working on hair. She said she did not have to stand all the time because for portions of her training she sat down while giving manicures. After completing her training in ten and one-half months, and obtaining a diploma in March or April 1992, claimant took and passed the state cosmetology examination in April and obtained her license in May 1992.

On January 24, 1992, Dr. G stopped claimant's physical therapy (PT) and his note stated that claimant's "insurance has cut her off." On February 24, 1992, Dr. G had claimant tested for impairment of her lumbar spine and the examining physical therapist, in

a report of that date, stated that claimant had a 5% impairment in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment. In a Report of Medical Evaluation (TWCC-69), Dr. G certified that claimant reached MMI on February 21, 1992, with a 5% whole body impairment rating and commented that claimant had not gone to PT for a long time. In his record of March 20, 1992, Dr. G stated he was then talking to claimant, that claimant had reached MMI, and that he agreed with the 5% impairment rating determined by the physical therapist. He stated further that claimant was not able to return to the type of work she had previously done, that she needed to continue therapeutics, and that he asked her to perform some kind of work because the insurance carrier had cut off her benefits. Claimant acknowledged seeing Dr. G on March 20th, possibly the date of her last visit to him, and being advised that he felt she had reached MMI and that the 5% impairment rating was accurate. Claimant also acknowledged receiving a letter from carrier dated April 7, 1992, which attached Dr. G's report and explained the 5% impairment rating and the impairment benefits she would receive for 15 weeks.

Claimant testified she did not dispute Dr. G's impairment rating within 90 days after being told of it because she was unaware she could do so. She said she called the Texas Workers' Compensation Commission (Commission) around September 30, 1992, and learned of the 90 day period in which to dispute an impairment rating. According to a Commission record officially noticed by the hearing officer, claimant called the Commission on or about October 9, 1992, and an inquiry was made as to whether she could dispute her impairment rating if it was assigned more than 90 days earlier. Claimant said she disputes Dr. G's rating because she does not believe she has reached MMI and feels the rating should be more than 5%, though she does not know how much higher. She said she would like her rating determined by an impartial physician. After Dr. G released her to go to work, claimant began employment with a beauty shop in May 1992 and worked half days until sometime in September 1992 when she quit because, as she said, "it just became too much for me." She said the increase in her clientele resulted in her having to be at the shop longer than she could physically handle due to pain. She also had to do household chores, so she decided to quit, stay home, and take care of her daughter and granddaughter who lived nearby.

Claimant started seeing (Dr. D) on October 2, 1992. She has also been treated by a chiropractor, (Dr. CD), whose report of October 21, 1992, stated claimant has pain in her low back, left hip, left leg, and between her shoulder blades, as well as neck pain and headaches. His diagnosis was left-sided sciatica, lumbar strain, sacroiliac sprain, thoracic sprain/strain, and cervicalgia. Dr. D obtained nerve conduction studies on November 4, 1992, which were normal, and claimant said Dr. D is going to try hip block injections. Dr. D's diagnosis on November 4th was low back pain and sciatica and his treatment plan included the continuation of chiropractic treatments, medications, and additional diagnostic tests.

Finding that claimant was certified as having reached MMI on February 21, 1992, with a 5% impairment rating, was notified of such rating and its effects on her benefits on April 7, 1992, and that she first disputed the rating on October 5, 1992, the hearing officer concluded that claimant did not dispute the certification of MMI and the rating within 90 days and, thus, that the rating became final. The hearing officer further found that claimant's inability to obtain and retain employment is not due to the injury of (date of injury), and concluded she is not suffering disability as defined by the 1989 Act.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) provides that "[t]he first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." We had occasion to comment on this Rule as follows in Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993:

> This rule affords a method by which the parties may rely that an assessment of impairment and MMI may safely be used to pay applicable benefits, by providing the time limit in which such assessment will be open to dispute.
>
> On the other hand, the rule also allows a liberal time frame within which the parties may ask for resolution of a dispute through the designated doctor provisions of the Act. This rules applies with equal force to the carrier and the claimant.

We further observed in Appeal No. 92670 that "[t]he Commission has determined that 90 days is a sufficient time frame for raising questions about the accuracy of a certification or impairment rating, and there are no exceptions in the rule." We have previously stated that the Commission's rules have the force and effect of law. Texas Workers' Compensation Commission Appeal No. 91073, decided December 20, 1991. Further, in the context of a similar time deadline, namely, the 30 day time period within which an injured employee must notify the employer of the injury, we held that ignorance of the law did not amount to good cause so as to afford an employee relief from the effects of failing to observe such time period. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. Since claimant, as she herself conceded, did not timely dispute Dr. G's determination that she reached MMI on February 21, 1992, with a 5% whole body impairment rating, such rating became final pursuant to Rule 130.5(e). The hearing officer's finding that claimant was advised of the impairment rating on April 7, 1992, is supported by the evidence (the carrier's letter). Thus the 90 day deadline in this case expired on July 6, 1992.

The disability issue becomes moot in view of the determinations on the MMI and impairment rating issues because disability arises in the context of entitlement to temporary income benefits, not impairment income benefits. Articles 8308-4.23 - 8308-4.26. Nevertheless, as the trier of fact the hearing officer is the sole judge of the relevance and

materiality of the evidence as well as of its weight and credibility. Article 8308-6.34(e). Since the hearing officer's findings and conclusions in this case, including those concerning disability, find sufficient support in the evidence, we do not substitute our judgment for that of the hearing officer. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). Article 8308-1.03(16) defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." The hearing officer could consider that within a few months of her injury claimant commenced a course involving day long classes over a ten and one-half month period during which time she spent part of her days standing and bending; that Dr. G released her to work, albeit not for the type of work she had performed as a counselor's assistant; and that she subsequently worked in a beauty shop for approximately four months performing duties involving bending and standing before deciding to quit. The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge